(1) Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STANLEY R. STERN,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a defendant be convicted of violating the money laundering statute, 18 U.S.C. § 1956, absent proof that the defendant had actual knowledge of the fact that the laundered funds came from unlawful activity, but where the defendant was allegedly "willfully blind" to the possibility that the funds came from "some form" of unlawful activity?

2. Should a defendant be convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 for arranging for checks to be cashed without the filing of Currency Transaction Reports, absent proof (1) that the defendant knew that under the particular circumstances, the filing of such reports was required by law, and (2) that the defendant specifically intended to violate that law?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Stanley R. Stern petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit affirming the Judgment of conviction entered in the United States District Court for the Middle District of Florida.

OPINION BELOW

The summary order of affirmance of the Court of Appeals (App. 1a) and the District Court's opinion denying Petitioner's motion for bail pending appeal (App. 3a) are unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the District Court was based on 18 U.S.C. § 3231.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1956(a)(1) provides, in pertinent part, as follows:

> "(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> * * * *
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;
>
> * * * *
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both."

STATEMENT

This case raises important and unsettled issues involving the proper construction and application of Federal laws governing money laundering and currency reporting. The fol-

lowing is a brief summary of the factual background of this case.

1. Prior to this case, Petitioner was an attorney practicing primarily in the fields of collection and bankruptcy work. The case arises out of certain of Petitioner's dealings with one of his clients, Anthony DiStefano.

According to the prosecution's evidence, DiStefano and various co-conspirators—not including Petitioner—engaged in a scheme to fleece a victim out of approximately $1.5 million. The Government contended that Petitioner committed various Federal offenses by assisting DiStefano in cashing checks derived from this fraud scheme without filing Currency Transaction Reports ("CTRs") with the Internal Revenue Service. The Government contended that Petitioner accomplished this by depositing checks received from DiStefano in his attorney's trust account, and by arranging for another client to deliver cash to DiStefano.

The Government did not contend that Petitioner participated in the fraud scheme perpetrated by DiStefano and his co-conspirators, or that Petitioner was even aware of the fact that this scheme was in existence. Nor did the Government offer any evidence of Petitioner's knowledge of the source of the money. All that the Government offered on the issue of Petitioner's knowledge as to the source of the funds was testimony by an FBI agent that Petitioner allegedly made an offhand comment while waiting to appear before the Grand Jury to the effect that Petitioner had suspected that the money might have had something to do with narcotics, which, of course, it did not.

2. A two-count indictment was returned against Petitioner in the United States District Court for the Middle District of Florida on November 9, 1993. Count One charged Petitioner with conspiring to defraud the United States in violation of 18 U.S.C. § 371 by agreeing to cash checks for DiStefano without the filing of CTRs. Count Two charged Petitioner with

money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) by knowingly engaging in a financial transaction involving the proceeds of "specified unlawful activity", *i.e.*, mail fraud, in order to conceal or disguise such proceeds.

The indictment was based on the theory that by depositing the checks from DiStefano in his trust account, and by arranging for another client to deliver cash to DiStefano, Petitioner acted as a *de facto* financial institution within the meaning of the Federal currency reporting statutes and regulations. Thus, the indictment charged that Petitioner himself had an obligation to file CTRs with respect to the transactions at issue, and that Petitioner allegedly engaged in a conspiracy to defraud the United States by conducting the transactions without filing CTRs.

3. Trial commenced on April 12, 1994. The District Court charged the jury, over the defense's objection, that the Government could carry its burden of proving the essential element of Petitioner's knowledge of the illegal origins of the funds involved in the transactions, by showing that Petitioner was "willfully blind" to the possibility that the funds came from criminal activity. The District Court charged the jury as follows:

> "When knowledge of the existence of a particular fact is an essential part of an offense, such knowledge may be established if the defendant is aware of a high probablity of its existence, unless he actually believes that it does not exist. . . . In other words, you may find that a defendant acted knowingly if you find beyond a reasonable doubt that either: One, the defendant actually knew that the money sent to his escrow accounts was the proceeds of some unlawful activity, or, two, that he deliberately closed his eyes to what he had every reason to believe was the fact."

The District Court also charged the jury that it could find that Stern constituted a *de facto* financial institution under the currency reporting statutes and regulations, 31 C.F.R. § 103.11(i), if the jury found that Petitioner acted as a currency dealer or exchanger "whether or not he did so on a regular basis or as an organized business concern." The District Court did not charge the jury that in order to convict, the jury also had to find that Petitioner knew that he constituted a "financial institution" under the statutes and regulations, or that he knew that he had an obligation to file CTRs under those provisions.

4. The jury returned guilty verdicts against Petitioner on both counts on April 18, 1994. On Ocotber 14, 1994, the District Court sentenced Petitioner to a term of sixty months' incarceration, to be followed by a three-year term of supervised release. The District Court also ordered restitution in the amount of $662,000. The District Court denied Petitioner's motion for bail pending appeal. (App. 3a)

The Court of Appeals affirmed Petitioner's conviction in a summary order entered on September 20, 1995. (App. 1a)

REASONS FOR GRANTING THE PETITION

This case raises important and unsettled issues regarding the proper scope and interpretation of the Federal money laundering and currency reporting statutes. Those statutes have become frequent bases for Federal prosecution in recent years. Conviction under these statutes carries extremely onerous penalties including substantial periods of incarceration and forfeiture, even in cases such as this where there is no connection between the alleged money laundering and narcotics trafficking. Moreover, this case poses particularly troublesome problems for a defendant, such as Petitioner, who was not involved in the underlying criminal activity giving rise to the laundered funds, and was not even aware of the

existence of that activity. This Court should grant review in order to address these issues.

I. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO DECIDE THE ISSUE OF WHETHER THE FEDERAL MONEY LAUNDERING STATUTE REQUIRES PROOF OF ACTUAL KNOWLEDGE OF THE ILLEGAL SOURCE OF THE LAUNDERED FUNDS.

The plain language of 18 U.S.C. § 1956(a)(1)(A) expressly states that a defendant may be convicted thereunder if the defendant engaged in a financial transaction involving the proceeds of specified unlawful activity "*knowing* that the property involved in the transaction represents the proceeds of some form of unlawful activity", and "*knowing* that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." A plain reading of the statute leads to the conclusion that in order to obtain a conviction, the Government must prove that the defendant had actual knowledge of the illegal origins of the funds; constructive knowledge does not suffice.

The United States Court of Appeals for the Second Circuit has stated that "the plain meaning of the statute" compels the conclusion that "18 U.S.C. § 1956(a)(1)(B) requires a 'knowing' mental state rather than mere recklessness or negligence." *United States v. Lora*, 895 F.2d 878, 880 n.2 (2d Cir. 1990). The District Court's opinion in *United States v. Waters*, 850 F.Supp. 1550, 1566 (N.D. Ala. 1994) also supports the conclusion that actual knowledge of the illegal origin of the funds is required in order to sustain a conviction under 18 U.S.C. § 1956(a)(1)(B). And, in *United States v. Heaps*, 39 F.3d 479, 484 (4th Cir. 1994), the Court of Appeals stated that "Section 1956(a)(1) requires the Government to prove that the defendant had 'actual subjective knowledge' that the money

used in a money laundering transaction was derived from an unlawful source."

In this case, the District Court's charge to the jury, as summarily affirmed by the Court of Appeals, permitted the jury to convict on a lesser standard. The jury was instructed that even if Petitioner was not proven to have had actual knowledge of the unlawful source of the funds, Petitioner could nevertheless be convicted if the jury found that he was willfully blind to the possibility that the funds came from some form of unlawful activity. This charge was tantamount to an instruction that permitted the jury to convict on a standard of recklessness or gross negligence, rather than the standard of actual knowledge which the statute requires.

This Court should grant the Petition in order to review this issue for several reasons.

1. The decision below is manifestly inconsistent with the plain meaning of the statute. Moreover, the legislative history of the money laundering statute further supports the conclusion that actual knowledge is required. *See* H.R. Rep. No. 855, 99th Cong., 2d Sess. 14 (1986) (remarks of Rep. Lungren: "It is a knowing standard. . . . It is not 'should have known, might have known, a reasonable person would have known,' it is 'this person knew the source of the income.' ").

The structure of the money laundering statute itself is inconsistent with the notion that a defendant can be convicted on a standard of willful blindness, without proof of actual knowledge. A defendant does not have to know the specific illegal activity giving rise to the funds, but merely needs to have knowledge that the funds came from "some form" of unlawful activity. 18 U.S.C. § 1956(c)(1). If the willful blindness instruction is superimposed upon this statutory provision, as the District Court's charge did here, the result is to permit a defendant to be convicted based merely on proof that the defendant was aware of a "probability" that the funds came from "some form" of unlawful activity. That standard is indis-

tinguishable from recklessness or negligence, and is manifestly inconsistent with the statutory requirement of actual knowledge.

2. The Court should grant review in order to resolve a conflict among the lower courts on this issue. As set forth above, some lower courts have recognized that a conviction under Section 1956(a)(1)(B) requires proof that the defendant had actual knowledge of the unlawful source of the funds. Other lower courts have ruled consistently with the decision in this case and have approved the giving of a willful blindness instruction in prosecutions under Section 1956. *See United States v. Rodriguez*, 53 F.3d 1439 (7th Cir. 1995); *United States v. Antzoulatos*, 962 F.2d 720 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 331 (1993); *United States v. Long*, 977 F.2d 1264 (8th Cir. 1992); *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1331 (1993).

As pointed out above, the combination of the willful blindness instruction, together with the statutory requirement that the defendant merely know that the funds were derived from "some form" of unlawful activity, yields a standard that is the equivalent of recklessness or negligence. That is inconsistent with the conclusion of several cases that "actual knowledge" is required for a conviction under Section 1956. Review should be granted in order to resolve this issue.

3. There is a strong public interest in having this Court lend clarity to the law regarding the standards for a conviction under the money laundering statute. The Sentencing Guidelines provide for extremely heavy sentences in money laundering cases, even in cases such as this where the funds were not related to narcotics trafficking. Indeed, the guideline applicable in this money laundering case yields a far more severe sentence than the guideline applicable to fraud, the criminal activity that gave rise to the funds involved in the transaction. The Sentencing Commission itself has recognized an injustice in the guidelines in this respect, and proposed

amending the guidelines in order to make the guideline for money laundering consistent with the guideline for the underlying offense, but Congress has not approved that proposed guideline amendment.

Thus, this case presents an extraordinary circumstance. Petitioner did not participate in the underlying fraud scheme or even know of its existence. Under the District Court's charge, the Government was not even required to prove that Petitioner had actual knowledge that the funds came from unlawful activity; it was sufficient that Petitioner was aware of a "probability" that the funds came from "some form" of unlawful activity. Upon being convicted on this basis, Petitioner was then subjected to a far more severe Sentencing Guideline than he would have faced had he been convicted of participating in the actual fraud scheme that gave rise to the funds.

Money laundering prosecutions have become a major component of the current Federal criminal docket. Such cases result in serious punishments, even in cases such as this where the underlying criminal activity is subject to more lenient treatment. There is a public interest in having this Court set forth clearly the legal standards governing a defendant's culpability in this important area. That is particularly true where the statute itself sets forth a mental standard inconsistent with the District Court's charge to the jury. In a related context arising under the Federal currency reporting statutes, this Court has recently emphsasized the importance of close adherence to statutory requirements. *Ratzlaf v. United States*, 114 S.Ct. 655, 659 (1994). See Point II, below. Those same reasons make this a case of public importance, and accordingly, this Court should grant review.

II. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO RESOLVE A CONFLICT AMONG THE LOWER COURTS CONCERNING THE REQUIRED MENTAL STATE IN A PROSECUTION FOR CONSPIRACY TO DEFRAUD THE UNITED STATES WITH RESPECT TO THE FAILURE TO REPORT CURRENCY TRANSACTIONS.

The indictment charged Petitioner with conspiracy to defraud the United States in violation of 18 U.S.C. § 371 by engaging in cash transactions without the filing of CTRs. The District Court charged the jury that it could find that Petitioner acted as a *de facto* financial institution and was therefore required to file CTRs. The District Court did not charge the jury, however, that it was also required to find that Petitioner knew that he constituted a financial institution under the applicable statutes and regulations; nor did the District Court charge the jury that it had to find that Petitioner knew that he had an obligation to file CTRs.

Petitioner argued below that the District Court's charge was inconsistent with this Court's recent decision in *Ratzlaf*, in which this Court held that a prosecution under the currency reporting statutes requires "proof of the defendant's knowledge of the reporting requirement and his specific intent to commit the crime." 114 S.Ct. at 659-660. Thus, under *Ratzlaf* it was an essential element of the offense that defendant *knew* that he constituted a financial institution under the applicable statute and regulations, that he *knew* that he had an obligation to file CTRs, and that he deliberately violated the law. *See also United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984); *United States v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978).

The Government argued in opposition that *Ratzlaf* did not apply because Petitioner was not technically prosecuted under the currency reporting statutes, but rather, was convicted of

conspiring to defraud the United States in violation of 18 U.S.C. § 371. The District Court agreed with this position (App. 5a), and the Court of Appeals summarily affirmed.

The question of whether the *Ratzlaf* rule applies in a prosecution for conspiracy to defraud the United States under Section 371, as opposed to a prosecution under the currency reporting statutes themselves, has been the subject of conflicting lower court decisions. The United States Courts of Appeals for the Second and Fourth Circuits have held that the same mental element applies in a conspiracy to defraud prosecution under Section 371 as in a prosecution under the currency reporting statutes. *United States v. Nersesian*, 824 F.2d 1294, 1314 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987); *United States v. Winfield*, 997 F.2d 1076, 1082-1083 (4th Cir. 1993). Earlier decisions by the Eleventh Circuit had also reached the same conclusion. *Eisenstein*, 731 F.2d at 1542; *United States v. Hernando Ospina*, 798 F.2d 1570, 1580 (11th Cir. 1986). That conclusion is consistent with the general rule that the required mental state in a conspiracy prosecution is the same as that for the substantive offense. *United States v. Rosenblatt*, 554 F.2d 36, 42 (2d Cir. 1977).

The United States Court of Appeals for the Seventh Circuit has adopted a different rule. The Seventh Circuit has held that *Ratzlaf's* requirement that the Government must prove the defendant's knowledge of the reporting requirement and his specific intent to violate it does not apply in a prosecution for conspiracy to defraud the United States under 18 U.S.C. § 371. *United States v. Brown*, 31 F.3d 484, 489 n.5 (7th Cir. 1994); *United States v. Jackson*, 33 F.3d 866, 871 (7th Cir. 1994).

This Court should grant the Petition in order to resolve this conflict among the Circuits. It is particularly important that the Court resolve that conflict since it involves the implementation of this Court's recent decision in *Ratzlaf*. For the reasons discussed above, clarity in the law is important in the

area of money laundering and currency reporting, given the complexity of the statutes and regulations, the large number of prosecutions, and the severity of the punishments. As such, this case is one of public importance meriting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: December 15, 1995
New York, N.Y.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3319

D.C. Docket No. 93-296-CR-T-24B

Filed September 20, 1995

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—versus—

STANLEY R. STERN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Before CARNES, *Circuit Judge,*
DYER and GARTH*, *Senior Circuit Judges.*

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* Honorable Leonard I. Garth, Senior Circuit Judge for the Third Circuit, sitting by designation.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 93-296-Cr-T-24(B)

UNITED STATES OF AMERICA

—vs.—

STANLEY R. STERN

ORDER

THIS CAUSE is before the Court on defendant's Motion for Bail Pending Appeal (Doc. No. 58). The government filed a response—United States' Response in Opposition to Defendant's Emergency Motion for Release on Bond Pending Appeal (Doc. No 60). A hearing on the motion was held on Wednesday, November 23, 1994.

On April 18, 1994, a jury found the defendant guilty of Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371 and Money Laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). On October 14, 1994, defendant Stanley Stern was sentenced to sixty (60) months in the Bureau of Prisons as to Count One and sixty (60) months as to Count Two of the indictment to run concurrent followed by thirty-six (36) months of supervised release to run concurrent. The defendant has remained at liberty on bail throughout the case and is to surrender himself at the institution designated by the Bureau of Prisons on December 18, 1994.

The Bail Reform Act 18 U.S.C. § 3143(b) presumes the defendant should be detained after conviction. The conviction is presumed correct and the burden is on the convicted defendant to overcome that presumption. *United States v. Giancola*, 754 F.2d 898, 900, 901 (11th Cir. 1985), *cert. denied*, 479 U.S. 1018 (1986).

The Court must find the following four factors in order to grant bail pending appeal:

1. that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released;
2. that the appeal is not for purpose of delay;
3. that the appeal raises a substantial question of law or fact; and
4. that if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.

United States v. Giancola, 754 F.2d at 901, 18 U.S.C. § 3143(b). The burden of establishing those factors is on the convicted defendant. *Giancola* at 901.

RISK OF FLIGHT AND DANGER TO THE COMMUNITY

The Court finds the defendant is not a risk of flight and not a danger to the community and on this factor alone he would be entitled to bail. He has appeared at all hearings before the Court. He has significant ties to his community. He has resigned his membership in the New York Bar and divested himself of his law practice.

SUBSTANTIAL QUESTION OF LAW OR FACT

In addition to not being a risk of flight or danger to the community, the Court must find that there is a substantial question of law or fact which if determined favorably is likely

to result in a reversal or order for a new trial on both counts. The defendant suggests there are three substantial issues to be raised on appeal.

1. The jury was not instructed that in order to return a guilty verdict it had to find beyond a reasonable doubt that Stern knew he was a "financial institution" and knew he was required to file a CTR.
2. The willful blindness doctrine was not applicable to this case.
3. Testimony concerning New York ethical requirements governing lawyers handling trust accounts should not have been allowed.

STERN AS A FINANCIAL INSTITUTION

The defendant was charged with conspiracy to defraud the United States, to impede and impair the lawful performance of the IRS in its duties; to wit: the collection of information on CTR's regarding currency transactions with financial institutions and people acting as financial institutions and further conducting and attempting to conduct a financial transaction with the proceeds of specified unlawful activity knowing said proceeds were from some unlawful activity with the intent to conceal the nature, location, source, ownership and control of the proceeds. The evidence supports a jury verdict that the defendant knew he was acting as a financial institution and subject to reporting requirements and did not want or intend for the IRS to be notified regarding the transactions. Should the appellate court find there was not sufficient proof defendant knew he was acting as a financial institution and subject to reporting requirements, that finding should not result in reversal since the jury could have found the defendant guilty of Count One in that he defrauded the United States by laundering money.

The jury was instructed that it is not necessary for the government to prove the defendant conspired to commit both but the jury had to agree unanimously upon which of the two

offenses the defendant conspired to commit. The defendant did not object to the instruction at trial.

WILLFUL BLINDNESS

The evidence justified the giving of a willful blindness instruction in this case. However, even the case relied on by the defendant for the proposition that the willful blindness doctrine should not be applied routinely in all cases, *United States v. Stone*, 9 F.3d 934 (11th Cir. 1993) found the giving of the instruction to be harmless.

TESTIMONY ON ETHICAL RULES INVOLVING TRUST ACCOUNTS

The Court twice instructed the jury on how it was to consider the expert testimony on New York Rules governing attorney trust accounts. The Court does not believe admission of such testimony improper in light of the cautionary instruction.

The Court finds the arguments of the defendant do not raise a substantial question of law or fact which if determined favorably are likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.

ACCORDINGLY it is ORDERED:

That defendant's Motion for Bail Pending Appeal is **denied.**

DONE and Ordered at Tampa, Florida this 25 day of November, 1994.

/s/ SUSAN C. BUCKLEW
SUSAN C. BUCKLEW
United States District Judge

Copies to:

Stuart E. Abrams, Esq.
David R. Jennings, Assistant U.S. Attorney